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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

No. 313

BERT SMITH,
Petitioner,

vs.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III,
As Trustees of the Property of Florida East Coast
Railway Company, a Florida Corporation,
Respondents.

PETITIONER'S REPLY BRIEF

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Several contentions advanced by respondents should not pass unnoticed.

Respondents claim that the record of the first trial was held inadmissible at the second trial "for the reason that petitioner had failed to show a substantial reason why the original witnesses were not produced." (Respondents' Brief, Page 4). Respondents have misread the record. The trial judge held the proffered testimony was in proper form but that the evidence was inadmissible because of the appellate holding that there "was no justiciable issue, at least

under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test." 104 So.2d 869. It would have been an idle ceremony to require the jury to hear three days of testimony which the appellate court had already held did not create a jury question. The matter is explicitly ruled on at R. 568:

> "MR. DANIELS: Maybe I didn't understand. I thought you held that we could not proffer it.
>
> THE COURT: No, I let you proffer it and I just excluded the proffer.
>
> MR. DANIELS: Oh, you accept it as a proper proffer, but you hold that it is inadmissible?
>
> THE COURT: That's right."

Respondents are also in error in claiming that petitioner has wholly abandoned his claim "that respondents were negligent in requiring petitioner to take the test, knowing of his likelihood of injury because of petitioner's physical condition." (Respondent's Brief, Page 2). The only reason this allegation was abandoned was that it was included in the original allegation that respondents were at fault "In negligently and unlawfully requiring the plaintiff to participate in such a 'field test' " (R. 2).

It is not deemed necessary to discuss or attack respondents' incorrect factual allegations regarding the reasons for and the circumstances of requiring petitioner to take the field test. The appellate holding in this case did not review the record and find no evidence of negligence. The appellate holding was, that no matter what the evidence, an FELA plaintiff did not create a "justiciable issue" by alleging negligence:

> "a. In negligently and unlawfully requiring the plaintiff to participate in a 'field test';

b. In negligently allowing its servants, agents or supervisors to conduct such a 'field test;'" (R. 2).

Without regard to the evidence, the holding below was:

> "* * * There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C.A., Sec. 151, et seq. Consequently, we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues. * * *" 104 So.2d at 869-870.

The opinion below to the contrary notwithstanding it is impossible for this to be a labor relations matter under the Railway Labor Act. Petitioner is totally and permanently disabled and has no capacity to labor or have labor relations. The issue is whether respondents can use the Labor Act as a shield to avoid payment for injuries caused by their negligence.

Respectfully submitted,

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WILLIAM S. FRATES,
Attorney for Petitioner.